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Arizona Corporation Commission

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DOCKET NO. T-00000A-00-0194

IN THE MATTER OF **Arizona Corporation Commission**

INVESTIGATION INTO **DOCKETED**

QWEST CORPORATION'S

COMPLIANCE WITH

CERTAIN WHOLESALE

PRICING REQUIREMENTS

FOR UNBUNDLED NETWORK

ELEMENTS AND RESALE

DISCOUNTS

JAN 14 2003

DOCKETED BY

ARIZONA CORPORATION COMMISSION
Complainant,

and

DOCKET NO. T-0105B-02-0871

v.

QWEST CORPORATION,

Respondent

COMPLAINT

AND

ORDER TO SHOW CAUSE

**MOUNTAIN TELECOMMUNICATIONS, INC.'S CONSOLIDATED
REPLY TO RESPONSES TO ITS MOTION FOR INJUNCTION**

Mountain Telecommunications, Inc. ("MTI"), by its attorneys, hereby files its consolidated reply to the Response to MTI's Motion for Injunction filed AT&T Communications of the Mountain States, Inc. ("AT&T") on January 31, 2003, and Opposition to MTI's Motion for Injunction filed by Qwest Corporation ("Qwest") on February 5, 2003. The responses filed by AT&T and Qwest provide no viable basis for denying MTI's Motion for Injunction. Therefore, the Commission should grant MTI's motion.¹

MTI's Motion for Injunction requests the Commission to issue an order enjoining Qwest from charging MTI unjust and unreasonable prices for unbundled network elements, and in the

¹ On January 9, 2003, MTI filed applications to intervene in the above-captioned proceedings. As of the date of this reply, MTI's applications to intervene remain pending.

alternative, requests the Commission to exercise its discretion under Section 40-252 of the Arizona Revised Statutes to stay the effective date of interim rules for pricing transport facilities established in Decision No. 64922, issued June 12, 2002, until such time as the Commission issues final rules regarding the pricing of transport facilities.² AT&T and Qwest both argue that the Commission lacks authority to enjoin Qwest from implementing the Qwest Wholesale Pricing Decision or to stay that decision.³ Qwest further contends that MTI is not entitled to injunctive relief.⁴ Contrary to AT&T and Qwest's objections, the Commission has ample authority to grant the injunctive relief requested by MTI. Moreover, MTI's request for injunctive relief is legally justified and would serve the public interest.

The Commission has ample authority to order Qwest to terminate its practice of charging unjust and unreasonable prices for transport facilities and to order such interim steps as necessary and proper to protect consumers of Qwest services from being subjected to such unlawful rates. The Commission has broad authority to supervise and regulate public service corporations. Section 40-202 of the Arizona Revised Statutes provides: "[t]he Commission may supervise and regulate every public service corporation in the state and do all things, whether specifically designated in this title or in addition thereto, necessary and convenient in the exercise of that power and jurisdiction."⁵ Thus, the Commission may determine that it is necessary to require a public service corporation under its jurisdiction to cease any unlawful actions, including the charging of rates which cannot be deemed to be just and reasonable.

² In the Matter of Investigation into Qwest Corporation's Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts, Docket No. T-00000A-00-0194 (*Phase II*) ("Qwest Wholesale Pricing Decision" or "Decision No. 64922").

³ See AT&T's Response, at 2-5; Qwest's Opposition, at 2-3.

⁴ See Qwest's Opposition, at 3-7.

⁵ A.R.S. § 40-202 (A) (emphasis added).

AT&T and Qwest incorrectly assert that the only means for the Commission to enjoin a public service corporation from acting in a manner contrary to law or any Commission order or regulation, is to commence an action in superior court under A.R.S. § 40-422. The Commission also has authority to initiate a proceeding to address a public service corporation's actions that are contrary to law.⁶ For example, upon learning of a possible violation of law by a public service corporation, the Commission may issue a notice to show cause to that corporation requesting it to show cause why it should not cease and desist practices contrary to the Commission's rules. See, e.g., G.L. Gibbons v. Construction Trucking Service, 102 Ariz. 383, 430 P.2d 145 (Ariz. 1967). Indeed, the Commission issued an Order to Show Cause (Decision No. 65450) in the above-captioned proceeding requesting Qwest to show cause why its failure to comply with a Commission order was not unreasonable. Therefore, the Commission may use a show cause proceeding as a vehicle to require a public service corporation to cease any actions that are contrary to law or Commission rules and orders.

Finally, the Commission's procedural rules support MTI's request that the Commission enjoin MTI from charging unreasonable and unjust prices for transport facilities. R14-3-101(A) provides that in "all cases in which procedure is set forth neither by law, nor by these rules, nor by regulations or orders of the Commission, the Rules of Civil Procedure for the Superior Court of Arizona . . . shall apply." The Commission's procedural rules, regulations, and orders do not contain any requirements regarding a request by a public service corporation for an injunction to be issued against another public service corporation. As such, the Commission may refer to Arizona's Rules of Civil Procedure, which include a rule governing the issuance of injunctions at Rule 65.

⁶ See A.R.S. §§ 40-202, 40-243.

The Commission also has authority to grant MTI's alternative request that the Commission exercise its discretion under A.R.S. § 40-252 to alter Decision No. 64922 so as to stay the effective date of interim rules for pricing transport facilities pending the Commission's issuance of final rules regarding the pricing of transport facilities. MTI has not requested the Commission to stay Decision No. 64922 in its entirety. Neither AT&T nor Qwest claim the Commission does not have a right to rescind, alter, or amend Decision No. 64922. Rather, AT&T and Qwest stress that the Commission may rescind, alter or amend its orders "only after providing notice to the affected corporations and providing an opportunity to be heard 'as upon complaint.'"⁷ This requirement has been interpreted by the Court of Appeals of Arizona to mean that "before the Commission may change an order or decision made by it, the Commission is required by statute to provide the affected corporation with notice and an opportunity to be heard." Tonto Creek Estates Homeowners Ass'n v. Arizona Corporation Commission, 177 Ariz. 49, 56, 864 P.2d 1081, 1088 (Ariz. Ct. App. 1993). MTI's request does not suggest that the Commission should ignore any relevant laws or regulations. MTI agrees that the Commission must provide Qwest with any procedural rights to which it is entitled prior to changing a previously issued order.

Based on the foregoing, the Commission has authority to enter the relief requested by MTI in its Motion for Injunction. Moreover, MTI has demonstrated that its requested relief is justified under the four factors the Commission must consider when evaluating a motion for injunctive relief. First, MTI has a substantial likelihood of succeeding on the merits in both of the above-captioned proceedings because Qwest's implementation of the Qwest Wholesale Pricing Decision resulted in rates that violate the underlying purpose of that decision, which is to

⁷ AT&T's Response, at 5.

facilitate telecommunications competition.⁸ Qwest's position that its rates for network elements are presumed to be just and reasonable because they comply with a pricing "model" adopted by the Commission lacks merit. At this time, MTI is not challenging the pricing model adopted by the Commission. Notwithstanding the assertions of Qwest and AT&T that the Commission somehow "approved" the transport rates now being charged by Qwest,⁹ in fact, the transport rates now being charged by Qwest were not "approved" by the Commission in Decision No. 64922. Indeed, nothing in that decision even indicates what the transport rates were to be, let alone indicates that the rates developed by Qwest six months after the decision based on its implementation of the HAI model were satisfactory to the Commission. Neither the Commission, its Staff, nor any of the other parties to the proceedings (with the possible exception of Qwest) had any idea what transport rates would be produced based on Qwest's implementation of the model. MTI is objecting to the manner in which Qwest has implemented that model. As explained in MTI's applications to intervene in the above-captioned proceedings and its Supplement to Applications to Intervene, Qwest's rates for transport and local interconnection services do not comply with the pricing standards of Section 252 of the Communications Act (47 U.S.C. § 252) (i.e., that prices for unbundled network elements be based on cost) or with the FCC's TELRIC pricing rules or with the just and reasonable standard of A.R.S. § 40-361.

In addition, Qwest has purported to implement its understanding of the pricing changes for transport and local interconnection facilities (rate increases), while it has only partially and

⁸ See Decision No. 64922, at 81.

⁹ AT&T Response, at 2 n.3 ("When an agency approves a rate, and the rate becomes final, the agency may not later on its own initiative or as the result of collateral attack make a retroactive determination of a different rate and require reparations."); Qwest Opposition, at 4 ("MTI blithely ignores that Commission-approved rates, if adopted in conformance with due process norms, are by definition, 'just and reasonable.'").

sporadically implemented the pricing changes for unbundled loops and for installation (almost entirely rate decreases). Qwest inaccurately asserts that it has “correctly calculated and billed MTI for the DTT transport and Local Interconnection Service Rate(s) as well as for all other unbundled recurring and non-recurring elements, consistent with the Commission’s Order.”¹⁰ Based on Qwest invoices received by MTI as of the date of this Reply, it appears that Qwest has consistently implemented rate increases for transport and local interconnection facilities. However, Qwest has only implemented rate decreases for local loops for eight percent of the circuits operated by MTI. For the reasons stated in the Motion for Injunction and the reasons stated in this Reply, MTI maintains that there is a substantial likelihood that the Commission will find that Qwest has implemented Decision No. 64922 in an unlawful manner.

Second, MTI has adequately demonstrated the existence of a possibility of irreparable harm if Qwest is not prevented from charging unjust and unreasonable amounts for transport facilities either by the Commission entering an injunction or by the Commission deciding to alter the effective date of the interim pricing rules set forth in Decision No. 64922. MTI has alleged that Qwest’s imposition of increased transport facilities charges will make it uneconomical for MTI to continue to provide competitive local telecommunications service in Arizona. Qwest erroneously alleges that MTI’s alleged harm is not suitable for injunctive relief. MTI’s loss is not simply economic, as asserted by Qwest. As stated by MTI, MTI’s payment of Qwest’s increased charges for transport will make it “uneconomical for MTI to continue to provide competitive local telecommunications service.”¹¹ Injunctive relief is warranted for harm to MTI’s ability to compete in the market for telecommunications services. Brennan Petroleum

¹⁰ See Qwest’s Opposition, at 5.

¹¹ MTI’s Motion for Injunction, at 8 (emphasis added).

Products Co. v. Pasco Petroleum Co., 373 F.Supp. 1312, 1316 (D. Ariz. 1974) (“Where the complained-of action results not only in contemporaneous loss of profits but in loss of goodwill or the ability to compete in the marketplace, the [injunctive] relief should be granted.”). Furthermore, Qwest’s contention that the ultimate extent of any harm suffered by MTI depends on the outcome of Phase III of the proceeding related to Qwest’s pricing of network elements has no bearing on whether MTI is entitled to the relief it requests now. MTI is currently experiencing harm. Contrary to Qwest’s assertion, it is the Commission’s subsequent mitigation of that harm by the issuance of an order in the future that is speculative, not MTI’s harm.

Third, the harm to MTI, if the Commission does not grant MTI’s Motion, significantly outweighs any harm to Qwest. Qwest will not suffer any damage if it is required to charge rates for transport facilities that it had been charging until December 2002, when Qwest decided to increase transport rates purportedly in accordance with its implementation of Decision No. 64922. In fact, Qwest fails even to assert that it will be harmed at all. Instead, Qwest and AT&T assert that grant of MTI’s Motion will harm the interests of all parties that participated in Phase II of the proceedings that resulted in the Qwest Wholesale Pricing Decision. Qwest’s concern for other interested parties is unfounded since the proceeding only determined the model to be used by it to develop the prices that Qwest would charge for unbundled network elements. If the Commission requires Qwest to charge its Pre-Decision No. 64922 rates for transport, which are substantially lower than the prices it is charging now, it is highly improbable that any other parties to the proceeding would be harmed. In contrast, MTI will suffer irreparable harm, as described *supra*.

Fourth, there is a significant public interest benefit in there being opportunities for full and fair competition within the market for local telecommunications services in Arizona. Grant

of the relief requested by MTI's motion is necessary to avoid the severe dislocations and disruptions to the local telecommunications service marketplace which will result from the cost increases now being implemented by Qwest. Qwest's concern that grant of MTI's request is inconsistent with the Commission's directives and would upset the orderly handling of future hearings is not justified. As explained above, the Commission has the right to defer in whole or in part, as appropriate, implementation of its decisions pursuant to A.R.S. § 40-252. Moreover, grant of MTI's request will ensure that the Commission will achieve its stated goal in Decision No. 64922 of encouraging competition to provide Arizona consumers with competitive choices.

CONCLUSION

Based on the foregoing, MTI respectfully requests the Commission to grant MTI's Motion for Injunction and alternative request that the Commission stay the effective date of the interim rules regarding the pricing of transport facilities pending the Commission's determination of final rules governing transport pricing.¹²

Respectfully submitted,

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February 14, 2003

¹² On February 12, 2003, MTI filed with the Commission a complaint against Qwest challenging the lawfulness of Qwest's rates for the network elements of transport and local interconnection facilities. Simultaneously with the filing of that complaint, MTI filed a motion for preliminary injunction in which it asked the Commission to enjoin Qwest from charging the rates for those network elements developed by Qwest purportedly based on its implementation of the HAI model, pending a resolution of the lawfulness of those rates. MTI believes that the interim relief requested is appropriate and in the public interest whether granted in the context of this proceeding or in the MTI complaint proceeding.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Mountain Telecommunications, Inc.'s Consolidated Reply to Responses to Its Motion for Injunction on all parties of record in this proceeding by mailing a copy thereof, properly addressed with first class postage prepaid to the following:

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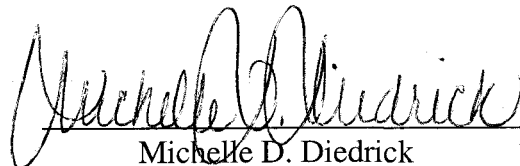
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